No. 93-289

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The Defense Base Closure and Realignment Act of 1990 (1990 Act), 10 U.S.C. 2687 note (Supp. IV 1992), establishes a mechanism to identify unneeded domestic military bases for closure and realignment. The questions presented are:

1. Whether the base closure and realignment recommendations of the Secretary of Defense and the Defense Base Closure and Realignment Commission or the President's decision to accept or reject the Commission's recommendations is subject to judicial review under the principles set forth in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992).

2. Whether the Base Closure Act itself "preclude[s] judicial review" of statutory claims for purposes of the Administrative Procedure Act, 5 U.S.C. 701(a)(1).

PARTIES TO THE PROCEEDING

Petitioners herein, who were defendants below, are John H. Dalton, Secretary of the Navy; Les Aspin, Secretary of Defense; The Defense Base Closure and Realignment Commission; and its members—James A. Courter; Peter B. Bowman; Beverly B. Byron; Rebecca G. Cox; Hansford T. Johnson; Harry C. McPherson, Jr.; and Robert D. Stuart, Jr. All petitioners except James A. Courter and Robert D. Stuart, Jr. are substituted as parties pursuant to Rule 35.3 of this Court.

Respondents in this Court, who were plaintiffs below, are Sen. Arlen Specter; Sen. Harris Wofford; Sen. Bill Bradley; Sen. Frank R. Lautenberg; Governor Robert P. Casey; Commonwealth of Pennsylvania; Ernest D. Preate, Jr., Pennsylvania Attorney General; Rep. Curt Weldon; Rep. Thomas Foglietta; Rep. Robert Andrews; Rep. R. Lawrence Coughlin; City of Philadelphia; Howard J. Landry; International Federation of Professional and Technical Engineers, Local 3; William F. Reil; Metal Trades Council, Local 687 Machinists; Governor James J. Florio; State of New Jersey; Robert J. Del Tufo, New Jersey Attorney General; Governor Michael N. Castle; State of Delaware; Rep. Peter H. Kostmeyer; Rep. Robert A. Borski; Ronald Warrington; and Planners Estimators Progressman & Schedulers Union Local No. 2.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 995 F.2d 404. A prior opinion of the court of appeals (Pet. App. 26a-82a) is reported at 971 F.2d 936. The opinion of the district court (Pet. App. 85a-91a) is reported at 777 F. Supp. 1226.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1993. A petition for rehearing was denied on June 14, 1993. Pet. App. 92a-94a. The petition for a writ of certiorari was filed on August 23, 1993, and was granted on October 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Defense Base Closure and Realignment Act of 1990 (1990 Act), as amended, 10

U.S.C. 2687 note (Supp. IV 1992),[1] and relevant provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 and 704, are reproduced at Pet. App. 98a-130a.

STATEMENT

A. Statutory Background

1. During the 1960s and 1970s, successive Administrations sought to reduce military expenditures by closing or realigning unnecessary domestic military bases. See Defense Base Closure and Realignment Commission, *Report to the President 1991*, at 1-1 [hereinafter *1991 Report*]; H.R. Rep. No. 1233, 94th Cong., 2d Sess. 5 (1976) (2700 base reductions, closures, or realignments since 1969). Because of the resulting economic dislocations in areas where bases were closed or realigned, the process encountered opposition from Members of Congress representing those areas. See, *e.g.*, 122 Cong. Rec. 30,446-30,447 (1976) (Sen. Kennedy); *id.* at 30,453-30,455 (Sen. Muskie); *id.* at 30,456 (Sen. Brooke). In addition, opposition to base closures was fueled in part by the perception that the Executive's selection of bases was influenced by improper political considerations. See *1991 Report* at 1-1.

To addresss those concerns, Congress in 1977 enacted procedural restrictions on the Executive's authority to close or realign the size of military bases. Military Construction Authorization Act, 1978, Pub. L. No. 95-82,

[1] The Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808, has been amended in respects not relevant here. See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, Tit. III, § 344(b)(1), 105 Stat. 1345; Pub. L. No. 102-190, Tit. XXVIII, §§ 2821, 2827(a), 105 Stat. 1544-1546, 1551; National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Tit. X, § 1054(b), 106 Stat. 2502; Pub. L. No. 102-484, Tit. XXVIII, § 2821(b), 106 Stat. 2607-2608. For simplicity, we refer to sections of the Base Closure Act as codified in 10 U.S.C. 2687 note (Supp. IV 1992).

§ 612, 91 Stat. 379-380 (1977), codified at 10 U.S.C. 2687 (Supp. I 1977).[2] That legislation required the Secretary of Defense or the pertinent service Secretary to give Congress and the public advance notice of potential military base closures or realignments. 10 U.S.C. 2687(b)(1) (Supp. I 1977). Moreover, at least 60 days before implementing a final base closure decision, the Department of Defense was to submit a "detailed justification" to the Armed Services Committees of both Houses. 10 U.S.C. 2687(b)(3)-(4) (Supp. I 1977). Finally, the statute required the Department of Defense to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.*, before proceeding with base closures. 10 U.S.C. 2687(b)(2) (Supp. I 1977).

The 1977 legislation imposed no substantive restrictions on the Executive's authority to close bases. Its procedural requirements, however, posed significant obstacles. In particular, opponents of base closure used NEPA litigation to delay and frustrate the base closure process. See, *e.g.*, H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988); H.R. Rep. No. 735, 100th Cong., 2d Sess. Pt. 1, at 8 (1988); *id.* Pt. 2, at 16. Such procedural impediments effectively prevented the government from carrying out significant base closures. See *1991 Report* at 1-1; H.R. Rep. No. 735, *supra*, Pt. 1, at 8 (noting testimony of Secretary of Defense that the government is unable "to close or realign unneeded military installations because of impediments, restrictions, and delays imposed by provisions of current law").

2. Congress first sought to break the resulting stalemate by enacting the Defense Authorization Amendments and Base Closure and Realignment Act of 1988 (1988 Act), Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2627-2634 (1988). The 1988 Act is the direct predecessor

[2] The previous year, Congress had enacted similar restrictions as a condition on the expenditure of appropriated funds. See Military Construction and Guard and Reserve Forces Facilities Authorization Acts, 1977, Pub. L. No. 94-431, § 612, 90 Stat. 1366-1367.

to, and shares many basic features with, the statute at issue here. The 1988 Act established an independent Commission on Base Closure and Realignment. 1988 Act § 203, 102 Stat. 2627-2628. The Commission was charged with preparing a base closure report for the Secretary of Defense, who had no authority to close bases until after he approved the report and forwarded it to Congress. 1988 Act §§ 201(1), 202(a)(1), 102 Stat. 2627. The 1988 Act also imposed a 45-day waiting period for Congress to enact a joint resolution of disapproval. 1988 Act § 202(b), 102 Stat. 2627.

The expedited report-and-wait mechanism was designed to eliminate the impediments created by the 1977 statute. See H.R. Rep. No. 735, *supra*, Pt. 1, at 8; *id.* Pt. 2, at 8. To that end, the 1988 Act not only made 10 U.S.C. 2687 inapplicable (1988 Act § 205(2), 102 Stat. 2630), but also explicitly exempted the base closure decisions of the Commission and the Secretary from NEPA. 1988 Act § 204(c)(1), 102 Stat. 2632; H.R. Rep. No. 735, *supra*, Pt. 1, at 10; *id.* Pt. 2, at 16: *id.* Pt. 3, at 4.[3] Although House and Senate conferees endorsed NEPA's goals of "public disclosure and clear identification of potential adverse environmental impacts," they nevertheless restricted the applicability of NEPA because of the "recogni[tion] that [it] ha[d] been used in some cases to delay and ultimately frustrate base closures." H.R. Conf. Rep. No. 1071, *supra*, at 23.

B. The Defense Base Closure And Realignment Act Of 1990

The 1988 Act did not establish a permanent mechanism for closing and realigning military installations; it

[3] In 1985, Congress revised 10 U.S.C. 2687 to eliminate the provision explicitly applying NEPA to base closures. See Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 1202(a), 99 Stat. 716. NEPA, however, continued to apply of its own force to some aspects of the base closure process. Thus, Congress was required to take further action to immunize base closure selection decisions from NEPA review. See H.R. Conf. Rep. No. 1071, *supra*, at 22-23; H.R. Rep. No. 735, *supra*, Pt. 2, at 16.

provided a mechanism for only one round of base closures. Accordingly, Congress passed the 1990 Act to provide a more comprehensive mechanism for identifying and closing unnecessary domestic military bases. In doing so, Congress relied on the 1988 Act as "an example of the right way to close bases" and assumed that "[a] new base closure process will not be credible unless the 1988 base closure process remains inviolate." H.R. Rep. No. 665, 101st Cong., 2d Sess. 342 (1990).

The 1990 Act provides for three rounds of base closures,[4] to take place in 1991, 1993, and 1995. § 2903(c)(1). For each round, the Secretary of Defense must submit a six-year "force-structure plan * * * based on an assessment * * * of the probable threats to the national security" during that period. § 2903(a). The Secretary also must establish, after notice and an opportunity for public comment, selection criteria for base closure recommendations. § 2903(b). Based on the force-structure plan and selection criteria for each round, the Secretary must prepare base closure recommendations for that round. § 2903(c).

The 1990 Act requires the Secretary of Defense, by April 15 in 1991 (and by March 15 in 1993 and 1995), to forward his recommendations to Congress and to the Defense Base Closure and Realignment Commission, an independent body whose members are appointed by the President (after consultation with specified congressional leaders), with the advice and consent of the Senate. §§ 2902(a), 2903(c)(1). The Commission is charged with holding public hearings and then preparing a report

[4] The Base Closure Act also governs so-called "realignments," which include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances." § 2910(5). For convenience, we use the term "base closures" to refer to both base closures and realignments.

containing both an assessment of the Secretary's recommendations and the Commission's own recommendations for base closures. § 2903(d)(1) and (2). The Commission may change the Secretary's recommendations if it determines that the Secretary has "deviated substantially" from the force-structure plan and the selection criteria. § 2903(d)(2)(B) and (C). The Commission must then forward its report to the President by July 1. § 2903(e).

The President may approve or disapprove the Commission's recommendations, and must transmit his determination to Congress and the Commission by July 15. § 2903(e)(1)-(3). If the President disapproves its recommendations, the Commission must prepare new recommendations and resubmit them to the President no later than August 15. § 2903(e)(3). If the President disapproves the revised recommendations (or takes no action by September 1), no bases may be selected that year for closure under the Act. § 2903(e)(5).

If the President approves the initial or revised recommendations, he must certify his approval to Congress, which reviews the President's decision through the mechanism of considering a joint resolution of disapproval. §§ 2904(b), 2908. If a joint resolution of disapproval is enacted, the Secretary of Defense may not close or realign the bases approved by the President. § 2904(b). If a joint resolution is not enacted within 45 days or by the date Congress adjourns for the session, whichever is earlier,[5] the Secretary must close or realign all of the military installations approved by the President for closure or realignment. § 2904(a), (b)(1).

The 1990 Act specifically provides that "[t]he provisions of the National Environmental Policy Act of 1969 * * * shall not apply to the actions of the President, the Commission, and * * * the Department of Defense in

[5] To facilitate the process of legislative consideration, the Act adopts streamlined legislative procedures to eliminate usual delays. § 2908.

carrying out [the 1990 Act]." § 2905(c)(1). The 1990 Act does allow NEPA review of steps taken to implement base closure decisions *after* bases have been selected for closure. See § 2905(c)(2)(A) (NEPA applies to decisions made "during the process of property disposal[] and * * * relocating functions"). But it strictly requires such post-selection NEPA suits to be filed within 60 days of the disputed action. § 2905(c)(3).

C. The Proceedings In This Case

1. a. On April 15, 1991, the Secretary of Defense transmitted to the Commission a list of domestic military installations for closure or realignment. That list included the Philadelphia Naval Shipyard. 56 Fed. Reg. 15,184 (1991). The Commission held public hearings in Washington, D.C., as well as in Philadelphia and elsewhere around the country, receiving testimony from Defense Department officials, legislators, and expert witnesses. Members of the Commission visited major facilities recommended for closure, including the Philadelphia Naval Shipyard. The Commission recommended closure or realignment of 82 bases. Those recommendations differed from the Secretary's in several respects, but the Commission concurred in the Secretary's recommendation to close the Philadelphia Naval Shipyard. Pet. App. 33a.

On July 10, 1991, the President approved the Commission's recommendations. J.A. 45. The Armed Services Committees of both Houses of Congress conducted hearings on the recommended closures. Pet. App. 33a-34a. On July 30, 1991, the House of Representatives entertained a resolution of disapproval. 137 Cong. Rec. H6006-H6039 (daily ed.). During the ensuing debate, several of the respondent Members of Congress urged adoption of the resolution because of alleged flaws in the procedures through which the Philadelphia Naval Shipyard was recommended for closure. See *id.* at H6009-H6010 (Rep. Weldon); *id.* at H6010-H6011 (Rep. Foglietta); *id.* at H6021 (Rep. Andrews). The House,

however, ultimately rejected the resolution of disapproval by a vote of 364 to 60. *Id.* at H6039; Pet. App. 34a.

b. On July 8, 1991, respondents filed this action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the 1990 Act against the Secretary of the Navy, the Secretary of Defense, the Commission, and the Commission's members, seeking to enjoin the closure of the Shipyard. J.A. 12, 53, 56, 58.[6] Respondents did not name the President as a defendant, nor did they allege that he violated the 1990 Act or otherwise acted improperly.

Respondents' complaint set forth three counts, two of which remain at issue here.[7] Count I alleged that the Secretary of the Navy and the Secretary of Defense violated substantive and procedural requirements of the 1990 Act in deciding to recommend the Philadelphia Naval Shipyard for closure. J.A. 50-53.[8] Count II made similar allegations concerning the Commission's preparation of its recommendations to the President. J.A. 54-57.[9]

[6] Respondents are Members of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New Jersey, and Delaware, and officials thereof; the City of Philadelphia; and several local unions and their presidents. See Pet. App. 33a.

[7] Count III alleged that petitioners denied respondents due process by depriving them of process rights allegedly guaranteed under the 1990 Act. J.A. 57. In its initial decision, the court of appeals held that respondents had identified no "legitimate claim of entitlement under the Act" and had failed to state a claim under the Due Process Clause. Pet. App. 69a. Respondents did not seek further review of that ruling, and it is not presented here.

[8] Respondents alleged that the Navy developed a deficient force structure plan (J.A. 33-35, 52); deviated substantially from the force structure plan and base closure criteria (J.A. 44); disregarded its own objective ratings (J.A. 33-33, 44); used unpublished selection criteria (J.A. 51); concealed its real reasons for selecting the Philadelphia Naval Shipyard (J.A. 51); withheld data from the General Accounting Office (GAO), the Commission, and Congress until after public hearings ended (J.A. 35, 43, 44, 50); failed to provide the GAO with sufficient documentation of its decision (J.A. 36, 37, 51); and failed to comply with Department of Defense directives concerning record keeping and "internal control plans" (J.A. 28, 52).

On November 1, 1991, the district court dismissed the suit in its entirety (Pet. App. 85a-91a), concluding that the 1990 Act itself "precludes judicial review" for purposes of the APA, 5 U.S.C. 701(a)(1). Pet. App. 85a-88a. In the alternative, the court held that the political question doctrine forecloses review of base closure decisions. *Id.* at 88a-91a.

2. a. On April 17, 1992, a divided panel of the court of appeals affirmed in part and reversed in part. See Pet. App. 26a-82a.[10] As a preliminary matter, the court of appeals considered whether the actions at issue constitute "final agency action" within the meaning of the APA, 5 U.S.C. 704. Although respondents were challenging the acts or omissions of the Secretary of Defense and the Commission in making their recommendations, the court reasoned that "at least in one sense, we are here asked to review a presidential decision." Pet. App. 43a. Because the Secretary and the Commission have authority only to make recommendations under the Act, the court reasoned that respondents "necessarily seek relief" from the President's decision to approve the Commission's recommendations. *Id.* at 42a. The court recognized that the

[9] Respondents alleged that the Commission used improper criteria such as the availability of private shipyard capacity (J.A. 42-42, 55); failed to consider all Navy installations equally (J.A. 55); adopted the Navy's recommendations even though the Commission knew of deficiencies in the Navy's decisionmaking process (J.A. 54-55); held closed meetings with the Navy after the completion of public hearings (J.A. 40-41); relied on Navy documentation that was not subject to GAO review or public comment (J.A. 40-41, 54); did not place certain information in the record until after the close of public hearings (J.A. 55); and failed to ensure that the GAO carried out its duties under the Act (J.A. 54).

[10] The court of appeals held that the respondent union members and Philadelphia Naval Shipyard employees had standing to challenge the base closure. Because the legal contentions of all of the respondents were the same, the court declined to address the standing of the other respondents. Pet. App. 36a-39a.

APA might not apply to "presidential decisionmaking" because the President might not be an "agency" within the meaning of that Act. *Id.* at 43a. Nevertheless, it concluded that the APA's judicial review provisions "represent[] a codification of the common law" and that the actions of the President are not, as such, immune from judicial review at common law. *Ibid.*

The court of appeals further held that the 1990 Act itself precludes judicial review of some, but not all, claims under the Act. First, the court held that no judicial review of decisions under the Act is available prior to the effective date of the President's decision, *i.e.*, until after expiration of the 45-day period for congressional review under Section 2904(b). The court explained that the Act sets a very stringent timetable and that "the ability of the participants to meet their responsibilities would be seriously jeopardized if litigation were permitted to divert their attention." Pet. App. 44a-45a.

Second, because Congress imposed "no restrictions on the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources," the court found that the substance of the President's base closure decision "is committed by law to presidential discretion." Pet. App. 46a. Similarly, the court determined that judicial review is unavailable to the extent that it relates to the merits of base closure recommendations prepared by the Secretary and the Commission. *Id.* at 56a-60a, 61a-62a.

At the same time, the court concluded that the 1990 Act does not preclude judicial review of compliance by the Secretary or the Commission with its procedural provisions. Pet. App. 60a-62a. Specifically, the court held that judicial review is available for respondents' claims that: (1) the Secretary failed to transmit to the Commission and the GAO all of the information that the Secretary used in making his recommendations; and (2) the Commission did not hold public hearings as required by the Act. *Id.* at 60a, 62a & n.15.

Finally, the court rejected the claims of the union and shipyard employees that the alleged violations of the 1990 Act violated their rights under the Due Process Clause. The court reasoned that the Act creates no property interest in the plaintiffs. Pet. App. 67a-69a.[11]

b. Judge Alito dissented, concluding that the 1990 Act precludes judicial review of all statutory claims, procedural as well as substantive. Pet. App. 69a-82a. After examining the structure and history of the 1990 Act, Judge Alito reasoned that judicial review of individual base closures would undermine the Act's objectives of expedition and finality, and would negate the crucial statutory feature of having all base closures approved or disapproved in a single package. *Id.* at 74a-82a. He also concluded that the legislative history, which discusses the need to eliminate litigation-related obstacles to base closure, supports preclusion of judicial review. *Id.* at 70a-74a.

3. On June 26, 1992, this Court rendered its decision in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, which, *inter alia*, addressed the existence of "final agency action" in a suit seeking APA review of the decennial reapportionment of the House of Representatives. The Census Act provides that the Secretary of Commerce must submit a census report to the President, who then certifies to Congress the number of Representatives to which each State is entitled under a statutory formula. This Court held that the Secretary's report was not "final agency action" reviewable under the APA (see 5 U.S.C. 704) because it served as "a tentative recommendation" and carried "no direct consequences for the reapportionment." *Id.* at 2774. Although the President's action had sufficient indicia of finality, the Court held that the President is not an "agency"—and that his certification to the

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[11] The court of appeals also reversed the district court's ruling that this suit should be dismissed under the political question doctrine. Pet. App. 63a-67a. We have not sought review of that holding.

House of Representatives therefore is not "agency action" —for purposes of the APA. *Id.* at 2775.

Because of the similarities between this case and *Franklin*, we petitioned for a writ of certiorari in this case. On November 9, 1992, this Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Franklin*. Pet. App. 83a-84a.

4. a. On May 18, 1993, a divided panel of the court of appeals held on remand that *Franklin* does not affect the reviewability of respondents' procedural claims. Pet. App. 1a-25a. The court reasoned that the Court in *Franklin* "declined only to review the President's decision under the APA" and that it "expressly sanctioned" judicial review of the constitutionality of presidential decisions. Pet. App. 10a. The majority concluded that if, as alleged, the Secretary and the Commission violated the 1990 Act's procedures, the President's subsequent approval of the Commission's recommendations violated the Act as well. *Id.* at 10a-12a. The majority further reasoned that if the President acts without constitutional or statutory authority, his actions violate the separation-of-powers doctrine and are therefore unconstitutional. *Ibid.* Accordingly, in the court's view, review of Presidential action for consistency with the "nondiscretionary mandates of [an] authorizing statute" is "a form of constitutional review" permitted under *Franklin*. *Id.* at 10a, 12a.

b. Judge Alito again dissented. Pet. App. 19a-25a. He noted that respondents "vigorously contended * * * that *Franklin* * * * does not bar review *under the APA*," and did not argue "that they were entitled to non-APA review based on either common law or separation of powers principles." *Id.* at 20a. Turning to the merits, Judge Alito disagreed with the majority's reasoning that respondents had stated a constitutional claim against the President simply by alleging that the Secretary of Defense and the Commission had failed to comply with all of the 1990 Act's procedural requirements. *Id.* at 21a-25a.

SUMMARY OF ARGUMENT

Respondents allege that the Department of Defense and the Base Closure Commission violated certain procedural requirements of the 1990 Act in the course of preparing nonbinding recommendations to close the Philadelphia Naval Shipyard. For two independently sufficient reasons, the court of appeals erred in holding that those claims are subject to judicial review. First, under *Franklin* v. *Massachusetts*, *supra*, the actions under challenge do not constitute "final agency action" reviewable under the APA. Second, the 1990 Act itself precludes judicial review of respondents' claims.

I. A. In *Franklin*, this Court held that there is no "final agency action" when an agency prepares a nonbinding recommendation for the President. Where the recommendations have no binding legal effect until they are accepted by the President, the agency's actions are not "final" under the APA. In addition, because the President is not an "agency" for purposes of the APA, his acceptance of the recommendations is unreviewable as well.

Franklin directly controls this case. The 1990 Act, like the census statute at issue in *Franklin*, requires federal agencies to prepare nonbinding recommendations that the President may accept or reject in his discretion. Thus, formulation of base closure recommendations by the Secretary of Defense and the Base Closure Commission is not "final agency action" under *Franklin* because the result of that process will not "directly affect the parties." 112 S. Ct. at 2273. *Franklin* also makes clear that the President's acceptance of the recommendations is not reviewable under the APA.

B. The court of appeals, however, held that *Franklin* does not bar judicial review of respondents' procedural claims because the Court in *Franklin* allowed judicial review of the constitutionality of the President's actions. The court reached that conclusion, moreover, despite the fact that respondents explicitly declined to challenge the

legality of the President's actions on any ground, constitutional or otherwise. And with the exception of a due process claim that the court of appeals had previously rejected on the merits, respondents claims against petitioners are exclusively statutory claims under the 1990 Act, not constitutional claims.

The court of appeals nevertheless held that respondents' claims are reviewable. It concluded that their procedural claims against the Secretary of Defense and the Commission automatically stated a constitutional claim—namely, that the President acted in excess of his authority by accepting recommendations alleged to be infected with procedural error. But for several reasons, that broad principle, which sharply undermines the APA's limitations on judicial review, cannot be sustained.

1. First, nothing in the 1990 Act states, or even suggests, that the President lacks the authority to accept the Commission's recommendations unless he first determines that the recommendation process was conducted free of procedural error. Rather, as the court of appeals itself acknowledged, "the President * * * may reject the Commission's recommendations for any reason at all," and that "the decision on which bases to close is committed by law to presidential discretion." Pet. App. 46a, 69a.

2. Second, the court of appeals' decision effectively transforms all claims of procedural error into claims of ultra vires conduct. By treating garden-variety claims of procedural error as allegations of ultra vires conduct, the court of appeals' reasoning would displace the carefully crafted review mechanism of the APA in favor of a broad doctrine of "common law" judicial review. That result not only would undo the careful balance struck when Congress enacted the APA's waiver of sovereign immunity in 1976, but also would contravene the notion that procedural errors in the implementation of a statute generally do not disable the government from acting.

3. Third, even if the President's actions had not been authorized by the 1990 Act, it does not follow that the President's acceptance of the recommendations violated

the Constitution. In contrast with the decision below, this Court's decisions have carefully distinguished between claims that an official exceeded his statutory authority and claims that he acted unconstitutionally. And contrary to the court of appeals' reasoning, nothing in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), warrants a different conclusion. *Youngstown* turned on whether the President had inherent constitutional authority to seize the nation's steel mills during wartime, and the President disclaimed any statutory authority for his action. Here, by contrast, the controversy turns exclusively on whether the 1990 Act authorizes the closure of the Philadelphia Naval Shipyard. In addition, the plaintiffs in *Youngstown* independently alleged that the President's action invaded their constitutionally protected property rights. Hence, there is no basis for reading *Youngstown* as establishing the principle that a claim of ultra vires action automatically states a judicially cognizable claim for relief under the Constitution.

II. Even if judicial review were not barred under *Franklin*, it would nevertheless be unavailable because the 1990 Act itself precludes judicial review. Judicial review of the base closure process is fundamentally antithetical to the structure, history, and purposes of the 1990 Act.

A. The court of appeals erred in holding that the actions at issue in this case are subject to the APA's presumption of reviewability. The base closure process inherently involves sensitive questions of military policy. And this Court has held that the presumption of reviewability does not apply to decisions of that nature.

B. Even if the presumption of reviewability did apply here, the structure, history, and purposes of the 1990 Act overcome that presumption and preclude judicial review. To carry out the militarily and politically sensitive task of closing domestic military bases, the 1990 Act strikes a careful balance between the Executive Branch and Congress. It makes the President personally responsible for the base closure decision, and provides for extensive congressional involvement and oversight in the process. To

limit the potential for political considerations to enter the process, the Act creates a neutral body, the Base Closure Commission, which is charged with preparing a single package of recommendations. The President must approve or disapprove the entire package, and Congress may invoke expedited procedures for passing a joint resolution of disapproval for the package as a whole. In addition, to avoid the delay and obstruction that characterized the base closure process in the past, the 1990 Act also emphasizes expedition and finality by creating a highly expedited decisionmaking process free from procedural obstacles.

Judicial review of respondents' claims cannot be reconciled with those features of the 1990 Act. If individuals were able to sue whenever they fail to achieve their objectives through the congressional oversight process established by the Act, that result would not only disrupt the careful balance struck between the political Branches, but also intrude on Congress's statutory oversight role. Judicial review would defeat the statutory goal of producing a single, indivisible package of base closures for consideration by the President and Congress. And it would make the Act's objectives of expedition and finality impossible to achieve.

C. The fact that respondents are advancing procedural claims does not make judicial review of those claims any less inconsistent with the structure and policies of the Act. Procedural litigation (primarily under NEPA) was among the primary sources of obstruction and delay in the base closure process prior to the enactment of the 1990 Act and its immediate predecessor, the 1988 Act. Accordingly, there is no basis for concluding that Congress's intent to preclude judicial review stops short of review for procedural errors.

ARGUMENT

I. *FRANKLIN* v. *MASSACHUSETTS* FORECLOSES JUDICIAL REVIEW

A. The Secretary's And The Commission's Base Closure Recommendations Are Not "Final Agency Action," And The President's Approval Of Those Recommendations Is Not Subject To The APA

The court of appeals' decision in this case squarely conflicts with the principles of judicial review set forth by this Court in *Franklin* v. *Massachusetts, supra.* Under the statute at issue in *Franklin,* the Secretary of Commerce prepared a report to the President containing each State's population according to the 1990 census, and the President, in turn, certified to Congress the number of United States Representatives to which each State was entitled under a statutory formula. 112 S. Ct. at 2771. The plaintiffs claimed, *inter alia,* that the Secretary's method of allocating overseas military service members among state populations was arbitrary and capricious under the APA.

This Court held that there was no "final agency action" reviewable under the APA. 112 S. Ct. at 2773. The Court explained that the "core question" regarding finality is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Ibid.* Because the Secretary's report "carrie[d] no direct consequences for the reapportionment," this Court held that it was "more like a tentative recommendation than a final and binding determination." *Id.* at 2774. By contrast, the President's transmittal of the report to Congress along with his certification of the number of Representatives "settle[d] the apportionment" and was "final" action in the relevant sense. *Id.* at 2775. The Court held, however, that the President is not an "agency" for purposes of the APA. "Out of respect for the separation of powers and the unique constitutional position of the President," the Court

concluded that the APA's "textual silence" concerning its coverage of the President was insufficient "to subject the President to [its] provisions." *Ibid.*

A straightforward application of *Franklin* makes clear that there likewise is no "final agency action" in this case. As relevant here, respondents challenge the procedures used by the Secretary of the Navy, Secretary of Defense, and the Commission to prepare their base closure recommendations. Like the Secretary's report in *Franklin,* the base closure report of the Commission is only tentative and has "no direct effect" (*Franklin,* 112 S. Ct. at 2774) until after the President certifies his approval of the report to Congress. See § 2904(a) and (b); pp. 5-6, *supra.* The actions of the Secretary of the Navy and the Secretary of Defense, which precede those of the Commission in the decision-making process, are still more "tentative." *Franklin,* 112 S. Ct. at 2774. Because the challenged actions of petitioners are merely nonbinding and preliminary to the President's final decision, they do not, under *Franklin,* constitute "final agency action" that is subject to judicial review under the APA. See *Cohen* v. *Rice,* 992 F.2d 376, 381-382 (1st Cir. 1993) (holding that *Franklin* forecloses judicial review of challenges to the preparation of recommendations under the 1990 Act); see also *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) (administrative actions "are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process"). And because the President is not an "agency," his action in approving the Commission's recommendations and certifying that approval to Congress is not subject to judicial review under the APA. *Franklin,* 112 S. Ct. at 2775-2776.

B. *Franklin's* Exception For Constitutional Challenges To Presidential Action Is Inapplicable

1. Although the Court vacated the court of appeals' initial decision in this case and remanded for further consideration in light of *Franklin* (see 113 S. Ct. 455; Pet. App. 83a-84a), the court of appeals on remand found respondents' procedural claims reviewable. The court of appeals acknowledged that under *Franklin,* respondents' claims are not reviewable under the APA. But the court found respondents' claims reviewable based on "common law" principles of judicial review outside the carefully limited provisions of the APA. See Pet. App. 8a. The court focused on *Franklin*'s observation that "the President's actions may * * * be reviewed for constitutionality," even though they are not subject to the APA. 112 S. Ct. at 2776. The court of appeals reasoned that if (as respondents allege) petitioners committed procedural violations of the 1990 Act in preparing base closure recommendations, the President exceeded his authority—and thereby violated the Constitution—by approving those recommendations and certifying his approval to Congress. Pet. App. 11a-13a.

That reasoning necessarily rests on the premise that respondents' claims of statutory error by the Secretary and the Commission inherently state a claim of constitutional violation by the President. Respondents have never alleged that the President violated any provision of law, much less the Constitution.[12] Rather, their complaint is

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[12] Aside from reciting the bare fact that the President approved the Commission's recommendations (J.A. 45), the complaint makes no reference to the President's actions. Nowhere does the complaint allege that the President committed any unconstitutional, or otherwise unlawful, act or omission. And respondents later went out of their way to make clear that they were not challenging the legality of the President's actions. Respondents emphasized to the court of appeals that "it is the conduct of [the] defendants—*not*

directed entirely at the alleged acts and omissions of the Navy, the Secretary of Defense, and the Commission prior to forwarding recommendations to the President. See notes 8-9, *supra*. Even as to those actions, moreover, respondents' only constitutional claim (under the Due Process Clause) was dismissed at an earlier stage in the proceedings and is no longer at issue in this case. See Pet. App. 67a-69a; note 7, *supra*. Thus, the clear import of the court of appeals' decision is that if petitioners violated the 1990 Act's procedural requirements in formulating their recommendations, the President necessarily violated the Constitution by accepting those recommendations.

The court of appeals' ruling effectively does away with *Franklin's* restrictions on judicial review of Presidential action. The principal claims found subject to review are (1) that the Secretary of Defense did not provide the Commission and the GAO with all the information used in making his recommendations, and (2) that the Commission held some nonpublic hearings. Pet. App. 60a, 62a & n.15. If those routine claims of statutory error by subordinate officials trigger "common law" (*id.* at 8a) judicial review of the President's formal approval of base closures, then *Franklin*'s exception for constitutional claims will swallow the rule that the President's actions are unreviewable.

That result is sharply at odds with *Franklin*'s concern for "the separation of powers and the unique constitutional position of the President." *Franklin*, 112 S. Ct. at 2775. By vesting the ultimate decision on base closures in the President (subject to legislative disapproval), Congress assigned responsibility for final action to a dis-

that of the President—that [they] challenge." Resp. C.A. Remand Br. 12 (emphasis added). Respondents also explained that they "do *not* seek review of the merits of any presidential decision or exercise of discretion, nor do they seek any relief from or involving the President, who is not a party." *Id.* at 8.

tinctly accountable officer. "The President's unique status under the Constitution distinguishes him from other executive officials." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1982). He is entrusted under the Constitution "with supervisory powers of utmost discretion and sensitivity," including the responsibility to " 'take Care that the Laws be faithfully executed.' " *Ibid.* (quoting U.S. Const. Art. II, § 3). Accordingly, this Court has been reluctant, in a variety of contexts, to hold that the President's actions are subject to judicial review. See, *e.g.*, *Franklin*, 112 S. Ct. at 2775-2776 (no review of presidential decisions under the APA); *Nixon* v. *Fitzgerald*, *supra* (President absolutely immune from private damage suits for actions taken within the outer perimeter of his official duties); *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867) (federal courts in general have "no jurisdiction * * * to enjoin the President in the performance of his official duties").

In light of the separation of powers considerations underlying *Franklin* and similar decisions of this Court (see *Nixon* v. *Fitzgerald*, 457 U.S. at 747-753; *Harlow* v. *Fitzgerald*, 457 U.S. 800, 811 n.17 (1982)), the President's direct exercise of authority should not lightly be subjected to broad judicial review on theories of "common law" reviewability. That is particularly so where, as here, the claims relate to alleged errors in the way his subordinates arrived at their tentative, nonbinding recommendations under a scheme that gives the President unfettered authority to accept or reject the recommendations in question.[13] See pp. 26-28, *infra*.

[13] The court of appeals erred in relying (Pet. App. 12a) on the proposition that *Franklin* involved only a claim of arbitrary and capricious action under the APA. The plaintiffs in that case also challenged the counting of overseas servicemembers on the ground that it violated the Census Act. See *Commonwealth* v. *Mosbacher*, 785 F. Supp. 230, 266 n.31 (D. Mass. 1992); *Franklin*, 112 S. Ct. at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment in part); No. 91-1502 Appellees Br. 74-76. Although the

This conclusion is strongly reinforced, moreover, by the fact that the broad "common law" action recognized by the court of appeals would effectively upset the legislative accommodation that resulted in Congress's waiver of sovereign immunity under the APA in 1976. See Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721, codified at 5 U.S.C. 702.[14] The type of action recognized by the court of appeals is a so-called "officer's suit"—*i.e.*, a nonstatutory challenge premised on the notion that an officer has acted in excess of his statutory authority. Before Congress amended the APA in 1976, such actions were a common basis for obtaining specific relief against federal officers in the absence of a waiver of sovereign immunity. See, *e.g.*, *Dugan* v. *Rank*, 372 U.S. 609, 621 (1963); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). The theory of such suits was that when an "officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson*, 337 U.S. at 689. Thus, if the officer "is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden," his acts "are *ultra vires* his authority and * * * may be made the object of specific relief." *Ibid.*

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majority in *Franklin* did not specifically refer to that claim, its holding that the appellees had no right of judicial review to raise their statutory claims under the APA would apply equally to their challenge under the Census Act. Both types of challenges are provided for under the APA, 5 U.S.C. 706(2) (allowing court to set aside agency actions that are "arbitrary and capricious," "an abuse of discretion," or "in excess of statutory * * * authority"), and the lack of "final agency action" precludes review of both.

[14] The waiver of sovereign immunity added to 5 U.S.C. 702 in 1976 provides: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."

As this Court has recognized, the doctrine of ultra vires conduct was applied confusingly and inconsistently. *International Primate Protection League* v. *Administrators of Tulane Education Fund*, 111 S. Ct. 1700, 1708 (1991); *Malone* v. *Bowdoin*, 369 U.S. 643, 646 (1962); see also H.R. Rep. No. 1656, 94th Cong., 2d Sess. 3-11 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3-9 (1976). In 1976, Congress enacted a waiver of sovereign immunity under the APA, in large measure, to rectify that confusion and to rationalize the law of judicial review of agency action. See H.R. Rep. No. 1656, *supra*, at 9-11; S. Rep. No. 996, *supra*, at 7-9. In eliminating the doctrine of sovereign immunity, however, Congress emphasized that other APA doctrines—governing the "availability, timing, and scope of judicial review"—would continue to be available to "control[] unnecessary judicial intervention in administrative decisions." H.R. Rep. No. 1656, *supra*, at 9; S. Rep. No. 996, *supra*, at 9.

The court of appeals' ruling in this case upsets the balance Congress struck in 5 U.S.C. 702. First, by holding that judicial review is available outside the confines of the APA on the theory of ultra vires Presidential action, the court threatens to introduce into the law the very brand of confusion that Congress amended the APA to eliminate in 1976. Second, by holding that judicial review is available without regard to the existence of "final agency action," the court disregarded Congress's understanding that official action is broadly reviewable, but only within the framework and limitations of the APA. This Court should not embrace the fiction that allows broad "common law" judicial review to determine whether executive officials acted in excess of their authority under the 1990 Act—even though their actions are not reviewable under the APA. See *Block* v. *North Dakota ex rel. Board of University & School Lands*, 461 U.S. 273, 280-286 (1983) (Congress waived sovereign immunity in suits involving federal land under Quiet Title Act; enactment of that carefully crafted statutory scheme precludes

resort to common law "officer's suits").[15] Particularly because the APA broadly provides for review of claims that an agency acted "in excess of statutory * * * authority" (5 U.S.C. 706(2)(C)), the effect of the lower courts' ruling is to allow review authorized by Congress under the APA, but without observance of the limitations imposed by Congress in the APA.

2. Even if an "officer's suit" of the type recognized by the court of appeals were available under current law, the President did not act ultra vires his authority in this case. The court of appeals believed that because the Act's procedural provisions are "nondiscretionary" (Pet. App. 12a), the alleged procedural errors of the Secretary and the Commission necessarily divested the President of authority to approve the Commission's recommendations. The effect of that reasoning, however, is to obliterate the distinction between routine statutory claims, like those at issue here (see p. 20, *supra*), and genuine claims of ultra vires action.

a. The proper distinction between simple error and ultra vires conduct is best illustrated by this Court's sovereign immunity cases. In those cases, this Court has distinguished between claims that an officer acted *"ultra vires* his authority," which are the proper subject of specific relief, and mere "claim[s] of error in the exercise of that power," [16] which are barred by sovereign immunity. *Larson*, 337 U.S. at 689-690. As the Court has explained, the pertinent line of demarcation is between claims addressing "the correctness or incorrectness" of a decision and those addressing "the power of [an] official, under the statute, to make a decision at all." [17] *Id.* at 691 n.12;

[15] The legislative history accompanying the 1976 waiver of sovereign immunity under the APA explicitly referred to enactment of the Quiet Title Act four years earlier as an illustration of why sovereign immunity should be waived generally. See H.R. Rep. No. 1656, *supra*, at 9 ("Just as there is little reason why the United States as a landowner should be treated differently from other landowners in an action to quiet title, so too has the time now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer in an official capacity."); S. Rep. No. 996, *supra*, at 8 (same). Thus, the Court's treatment in *Block* of the waiver of sovereign immunity under the Quiet Title Act, and its relevance to the continued availability of "officer's suits," are directly pertinent here with respect to respondents' efforts to circumvent the APA.

[16] For an illustration of a case involving mere error, see *United States ex rel. Goldberg* v. *Daniels*, 231 U.S. 218 (1913), upon which the Court relied heavily in *Larson*, 337 U.S. at 700-702. In *Goldberg*, the Secretary of the Navy awarded a contract for the sale of a surplus vessel to someone other than the high bidder. The high bidder then filed suit to compel the Secretary to deliver the vessel to him. Although the lower courts considered whether the sale was consummated when the Secretary opened the high bid, this Court refused to address the merits of that issue. As the Court explained in *Larson*, "[w]rongful the Secretary's conduct might be, but a suit to relieve the wrong by obtaining the vessel would interfere with the sovereign behind its back and hence must fail." *Larson*, 337 U.S. at 700-701.

[17] In that respect, the analysis of ultra vires executive conduct is properly analogized to the question whether a federal court has subject matter jurisdiction. Just as an executive official is authorized to act only if he has constitutional or statutory authority (see, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952)), a federal court must have statutory or constitutional authority before it may exercise jurisdiction over a case. See, *e.g.*, *Finley* v. *United States*, 490 U.S. 545, 547-548 (1989). This Court has accordingly equated the existence of subject matter jurisdiction with a federal court's "power to act" at all. *McLucas* v. *DeChamplain*, 421 U.S. 21, 28 (1975). In contrast, the Court has emphasized that "[a]ny error in granting or designing relief 'does not go to the jurisdiction of the court.'" *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 561 (1968) (quoting *Swift & Co.* v. *United States*, 276 U.S. 311, 331 (1928)). Thus, it is significant that this Court has never treated a federal court's violation of a nondiscretionary procedural rule as a matter that divests the court of jurisdiction to enter a judgment. *Cf. United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993) (litigants in criminal and civil cases may waive their procedural rights in federal court).

see *Noble* v. *Union River Logging R.R.*, 147 U.S. 165, 174 (1893).

Although application of the distinction is not always straight-forward (see, *e.g.*, *Primate Protection League*, 111 S. Ct. at 1708), a finding of ultra vires executive action at a minimum requires a "depart[ure] from a plain official duty" (*Payne* v. *Central Pac. Ry.*, 255 U.S. 228, 238 (1921)), rather than a challenge to action that involves the exercise of executive discretion. See, *e.g.*, *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 110-111 n.20 (1984) (collecting cases); *Board of Liquidation* v. *McComb*, 92 U.S. 531, 541 (1876) (specific relief against violation of "plain official duty, requiring no exercise of discretion"). In other words, "a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake." *Kendall* v. *Stokes*, 44 U.S. (3 How.) 87, 98 (1845); see also *Wells* v. *Roper*, 246 U.S. 335, 338 (1918).

Under the foregoing principles, the court of appeals in this case erred in holding that respondents' procedural allegations against the Secretary of Defense and the Commission state claims of ultra vires action by the President. Contrary to the majority's reasoning (Pet. App. 12a), nothing in the 1990 Act denies the President authority to approve the Commission's recommendations unless he first determines that they were formulated free of procedural error. The President's powers and responsibilities are set forth in Section 2903(e) of the 1990 Act. Under the terms of that provision, the President "shall, by no later than July 15 * * *, transmit to the Commission and to the Congress a report containing the President's approval or disapproval of the Commission's recommendations." § 2903(e)(1). If the President disapproves the Commission's recommendations in whole or in part, he "shall transmit to the Commission and the Congress the

reasons for that disapproval." § 2903(e)(3). In that event, the Commission must submit a revised list of recommendations by August 15, and if the President approves the revised recommendations, he "shall transmit a copy of such revised recommendations to the Congress, together with a certification of such approval." § 2903(e)(4)-(5).

Nowhere in those provisions has Congress imposed, or even suggested, any condition or limitation on the President's unqualified authority to "approv[e] or disapprov[e]" the Commission's recommendations.[18] Rather, the only obligation imposed on the President by the 1990 Act is to decide, in his discretion, to approve or disapprove those recommendations and give notice of his decision to the Commission and Congress within the time allowed. § 2903(e)(1)-(4). As Judge Alito explained in his dissent below:

> Nothing in these provisions suggests that the President, upon receiving the Commission's recommendations, must determine whether any procedural violations occurred at any prior stage of the statutory process. Nothing in these provisions suggests that the President must reject the Commission's package of recommendations if such procedural violations come to his attention. Nothing in these provisions suggests that the President must base his approval or disapproval of the Commission's recommendations exclusively on the record of the proceedings before the Commission. Nothing in these provisions suggests that the President, if he wishes to approve the Commission's recommendations, must do so for the same reasons as the Commission. And nothing in these provisions suggests that the President or the

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[18] Respondents themselves conceded below that "[i]t is *not* the President's duty to review the procedural integrity of the base closure process or analyze whether [petitioners] complied with the Act's procedural mandates." Resp. C.A. Remand Br. 2.

> Secretary of Defense must or even can refuse to carry out a base closing or realignment contained in an approved package of recommendations on the ground that the Commission's recommendation regarding the affected base was tainted by prior procedural irregularities.

Pet. App. 23a-24a.[19]

Indeed, the court of appeals acknowledged in its initial decision that "the President and Congress * * * may reject the Commission's recommendations for any reason at all," and that "the decision on which bases to close is committed by law to presidential discretion." Pet. App. 46a, 69a. That conclusion cannot be squared with the court's subsequent determination that the President acts wholly beyond his authority if he accepts the Commission's recommendations without verifying that every procedure has been fully observed. Whatever the merits of respondents' claims that the Secretary or the Commission erred, the President was under no "plain official duty" (*Payne*, 255 U.S. at 238) to reject a set of recommendations alleged to be infected by procedural error, and he was not disabled from "mak[ing] a decision at all" (*Larson*, 337 U.S. at 691 n.12) in the circumstances presented here. Rather, because the President's authority to accept or reject the Commission's recommendations "had no limitation placed upon it by the Congress" (*Dugan*, 372 U.S. at 622), he did not act beyond his statutory powers by accepting the Commission's recommendations in this case, whether or not the Commission or Secretary might have committed procedural error along the way.

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[19] Of course, even though the President is not required to review the procedural integrity of petitioners' actions, he is not foreclosed from doing so in the exercise of his broad discretion under the 1990 Act. The President may approve or disapprove the Commission's recommendations on any ground, including procedural grounds such as those advanced by respondents.

b. That conclusion is reinforced by this Court's precedents holding that an agency's failure to comply with mandatory statutory procedures does not in itself disable the agency from acting unless Congress has expressly so provided. As this Court has explained, "[t]here is no presumption or general rule that for every duty imposed upon * * * the Government * * * there must exist some corollary punitive sanction for departures or omissions." *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717 (1990) (government may seek pretrial detention despite failure to comply with statutory "first appearance" requirement). Rather, "[m]any statutory requisitions intended for the guide of officers in the conduct of business devolved upon them * * * do not limit their power or render its exercise in disregard of the requisitions ineffectual." *Id.* at 718 (quoting *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872)). This Court has accordingly been "reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986) (agency not disabled from proceeding because of failure to meet 120-day limitation on action to recover misused federal funds); see also *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886) (noting "great principle of public policy * * * which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided").

Thus, where a statute cannot "be read to require, or even suggest," that a procedural error disables the government from acting, no such consequence should be implied. *Montalvo-Murillo*, 495 U.S. at 717; see *id.* at 717-719. Furthermore, this Court has made clear that Congress's use of mandatory language in imposing a procedural requirement does not lead to the conclusion that the requirement limits the agency's "power to act." *Brock*, 476 U.S. at 262. In this case, it is significant that the 1990 Act contains no suggestion either that the proce-

dural requirements imposed on the Secretary and the Commission bind the President or that the President's discretion to accept or reject the Commission's recommendations is limited in any way. Given the President's personal responsibility for accepting or rejecting base closure recommendations and Congress's streamlined procedures for considering whether to disapprove them, it is implausible to suppose that Congress meant to bring the base closure process to a halt if a subordinate official committed a procedural error in preparing recommendations for those who are uniquely responsible—and politically accountable—for the ultimate base closure decisions.

3. Even if the President acted beyond his statutory authority in approving the Commission's recommendations, the court of appeals erred in further concluding (Pet. App. 11a-12a) that the respondents stated a claim for relief under the Constitution.

In finding that respondents stated a constitutional claim, the court of appeals reasoned that under *Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* the President must have constitutional or statutory authority for whatever action he takes. Pet. App. 11a. The court then concluded that because the President has no inherent authority to close military bases, if he acted without statutory authority, he violated the Constitution. *Id.* at 12a ("our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review").

Contrary to the court of appeals' reasoning, however, no decision of this Court suggests that an Executive Branch officer who acts in excess of his statutory authority automatically thereby violates the Constitution. Rather, this Court has explicitly distinguished between "actions contrary to [a] constitutional prohibition" and actions "merely said to be in excess of the authority delegated * * * by the Congress." *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 396-397 (1971); see also *Wheeldin* v. *Wheeler,* 373 U.S. 647, 650-652 (1963) (absent a Fourth Amendment

violation, no federal cause of action exists for abuse of delegated subpoena power). Furthermore, this Court's cases involving "officer's suits" expressly contemplate that immunity may be stripped from an official's actions if the officer being sued has acted either "unconstitutionally *or* beyond his statutory powers." *Larson,* 337 U.S. at 691 n.11 (emphasis added); accord, *e.g., Dugan,* 372 U.S. at 621-622; *Philadelphia Co.* v. *Stimson,* 223 U.S. 605, 620 (1912). There would have been no reason for the Court to specify unconstitutionality and ultra vires conduct as separate categories in those cases if, as the court of appeals apparently believed (Pet. App. 11a), all conduct in excess of statutory powers were unconstitutional for that reason alone.

In pre-1976 cases such as *Larson,* the question of ultra vires conduct arose in the specific context of deciding whether sovereign immunity shielded the conduct at issue from challenge; it did not go to the distinct question, presented here, whether the plaintiff stated a claim for relief, much less a claim for relief under the Constitution. See *Larson,* 337 U.S. at 693 (distinguishing issue of "invasion of legal rights" from question whether conduct complained of is "sovereign or individual"); Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies,* S. Doc. No. 8, 77th Cong., 1st Sess. 81 (1941) ("The plaintiff cannot sue to redress merely any unauthorized action by an officer. To maintain the suit the plaintiff must allege conduct by the officer which, if not justified by his official authority, is a private wrong to the plaintiff."). To be sure, in some instances the availability of a common law cause of action has turned on whether the government was authorized to undertake particular action. See, *e.g., Dugan,* 372 U.S. at 622-623.[20] Even in those cases, how-

[20] In *Dugan,* for example, the Court held that the government's authority to seize the plaintiffs' water rights eliminated any claim that the action was a trespass. 372 U.S. at 622-623. Because the government's invasion of their rights was authorized, the plaintiffs

ever, the presence or absence of ultra vires conduct was relevant only to whether an existing cause of action could be invoked; we are unaware of any case in which this Court held that a lack of authority was the source of the private right in question.

The court of appeals' contrary conclusion—that an allegation of ultra vires conduct inherently states a cause of action under the Constitution (Pet. App. 11a-12a)—rests largely on a misreading of *Youngstown*. That case involved the President's authority to seize private domestic steel mills during the Korean War. See 343 U.S. at 582-583. The mill owners sued to enjoin the seizure, arguing that Congress, and not the President, had the authority to seize the mills. This Court agreed, holding that the Executive had usurped congressional authority. *Id.* at 588.

Youngstown differs from this case in two crucial respects, each of which undermines the court of appeals' broad reliance on that case. First, the government in *Youngstown* disclaimed any statutory basis for the President's actions. See 343 U.S. at 585-586. Although two statutes authorized the seizure of private property under specified conditions, it was conceded that "these conditions were not met," that "the President's order was not rooted in either of the statutes," and that the pertinent stautory authority was "too cumbersome, involved, and time-consuming." *Id.* at 586. Instead, the government defended the seizures exclusively on the ground that they were authorized by Article II of the Constitution. 343 U.S. at 587-588. As a result, the sole issue presented to the courts was the constitutional question whether "the seizure order [was] within the constitutional power of the President." *Id.* at 584.[21]

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did not have a claim for trespass, but were limited to an action in the Court of Claims for a taking of property without just compensation. *Id.* at 623.

[21] A similar constitutional challenge was presented in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), the other case cited by this Court in *Franklin* for the proposition that presidential conduct may be reviewed for constitutionality. In *Panama Refining*, Congress vested the President with authority to ban interstate transportation of oil produced in violation of state production and marketing limits. This Court invalidated the statute as an unconstitutional delegation of Congress's Article I powers. In *Panama Refining*, as in *Youngstown*, the dispute did not involve the scope of the President's statutory authority; rather, the challenge turned solely on the Constitution. In addition, the plaintiffs' complaint in *Panama Refining* alleged that their property rights were being invaded by state and federal officials, and that the statutes in question violated the Fourth and Fifth Amendments and the nondelegation doctrine. Amended Bill of Complaint 1-9, *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935) (No. 135).

Here, by contrast, the underlying legal controversy involves purely a statutory question. Respondents claim that petitioners did not comply with the 1990 Act. Petitioners argue that they did. Neither the President nor petitioners have relied on inherent Article II powers in selecting the Philadelphia Naval Shipyard for closure. Thus, even if respondents' allegations had focused on the President's acceptance of the base closure recommendations, resolution of the dispute in this case would not require a judgment about the constitutional authority of the President. In short, to characterize this statutory controversy as a separation-of-powers dispute, as in *Youngstown*, is to disregard the essence of the claims and defenses in this case.

Second, the seizure of the steel mills in *Youngstown* invaded the property rights of the mill owners—personal rights that were protected not only by the common law, but also by the Fifth Amendment. By contrast, closure of the Philadelphia Naval Shipyard does not deprive respondents of any such rights. In its initial decision, the court of appeals held (and respondents have not contested) that the respondent unions and employees—the plaintiffs with the most concrete stake in this litigation—lack any property interest in the Shipyard's continued operation. See Pet. App. 69a (respondents "can identify

no legitimate claim of entitlement").[22] Thus, unlike the typical case involving the issue of ultra vires conduct, there is no independent common law or constitutional right to be vindicated by respondents' claims. Compare, *e.g., Philadelphia Co.* v. *Stimson*, 223 U.S. at 632 (land title and riparian rights under state law); *Larson*, 337 U.S. at 693 (tort claim); *Dugan*, 372 U.S. at 622 (trespass claim); *Youngstown, supra* (unauthorized taking and trespass); see also *Franklin*, 112 S. Ct. at 2776-2777 (justiciable claim of malapportionment under Article I, § 2, Cl. 3).

In short, *Youngstown* provides no support for the court of appeals' decision because this case lacks both the constitutional dimensions and the protected private interests that supported the exercise of judicial power in *Youngstown*. Respondents have, in fact, brought a straightforward action for APA review of the actions of subordinate federal officials in preparing nonbinding recommendations for the President. Because *Franklin* instructs that those actions are not "final agency action[s]" for purposes of the APA, those claims are not subject to judicial review under the APA. The court of appeals erred in circumventing the holding of *Franklin* by treating respondents' routine claims of procedural error under the 1990 Act as claims of constitutional deprivation.

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[22] The court of appeals in this case correctly held that respondents' due process claim failed for want of a cognizable property interest. The 1990 Act vests no property rights in respondents, because it vests absolute discretion in the President. *Cf. Meachum* v. *Fano*, 427 U.S. 215, 226-229 (1976) (discretionary decision by state prison officials to transfer prisoner implicated no liberty interest, despite loss of employment); *Bishop* v. *Wood*, 426 U.S. 341, 344-347 (1976) (no property interest in "at will" employment); see also *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"). Absent such a property interest, plaintiffs cannot assert a due process claim.

II. THE STRUCTURE, HISTORY, AND PURPOSES OF THE DEFENSE BASE CLOSURE AND REALIGNMENT ACT IN ANY EVENT ESTABLISH THAT THE ACT PRECLUDES JUDICIAL REVIEW

If the Court concludes, contrary to our submission in Point I, that review is not foreclosed by *Franklin* v. *Massachusetts*, this case must still be dismissed because the 1990 Act "preclude[s] judicial review" of respondents' claims within the meaning of the APA, 5 U.S.C. 701(a)(2). Although the court of appeals held that the 1990 Act impliedly precludes judicial review of respondents' substantive challenges to decisions made during the base selection process (Pet. App. 55a-60a, 61a-62a),[23] it also held that the Act does not preclude courts from reviewing claims that the Department of Defense and the Commission failed to comply with the Act's procedural requirements. *Id.* at 60a, 61a-62a. The former ruling is, in our view, correct, and it has not been challenged by respondents in this Court. The latter ruling, however, is wrong.

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[23] In particular, the court of appeals found that Congress did not intend to permit judicial review of claims that (1) the Secretary's force structure plan lacked sufficient detail; (2) the force structure plan was based upon insufficient data; (3) the Secretary impermissibly prejudged the question whether the Philadelphia Naval Shipyard should be closed; and (4) the Secretary of Defense relied on insufficiently explained and inadequately documented advice from the Secretary of the Navy. Pet. App. 56a. The court reasoned that Congress committed those matters to the Secretary's discretion, that the decisions required military and other types of expertise, and that Congress provided alternative avenues of review through the Commission and the GAO. *Id.* at 56a-58a. The court also found that the 1990 Act precludes review of respondents' claims that the Commission (1) failed to consider all Navy installations equally; (2) accepted inadequately documented recommendations; (3) utilized unpublished criteria; and (4) failed to apply published criteria equally. *Id.* at 61a. In the court's view, those issues are not amenable to review under judicially manageable standards, and the 1990 Act provides alternative means of review of the Commission's decisionmaking—specifically, oversight by the President and Congress. *Id.* at 62a.

The 1990 Act embodies an intricate compromise that carefully accommodates the interests of the Executive Branch and Congress in order to achieve consensus on the politically sensitive issue of closing domestic military bases in a politically neutral and expeditious manner. To achieve that end, the Act assigns the President a direct and personal role in the base closure process and involves Congress in overseeing the Executive Branch's decisionmaking process. The Act also requires that bases be proposed for closure by a nonpartisan Commission whose recommendations must be accepted or rejected as a single, indivisible package. Finally, to accomplish Congress's goals of expedition and finality, the 1990 Act eliminates procedural obstacles that effectively blocked the closure of bases prior to 1988.

Judicial intervention at the behest of persons affected by individual base closures strikes at the heart of this carefully developed statutory scheme. It invites federal courts to overturn the result embraced by the political Branches through the statutory process. It threatens to disrupt the balance struck by the Act, and in so doing, to displace the President and Congress as the final arbiters of the base closure process. And it subjects the President's decision to the very kinds of procedural litigation and delays that the 1990 Act was designed to eliminate.

A. The Court Of Appeals Erred In Applying The Presumption Of Reviewability

The court of appeals began its analysis with the general presumption in favor of judicial review of administrative actions. Pet. App. 45a-46a. Reliance on that presumption is misplaced in the context of the 1990 Act, which addresses sensitive questions of national security and military policy. See *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988) (presumption of reviewability "runs aground when it encounters concerns of national security"); see also *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (no *Bivens* remedy available for service-related military injuries); *Orloff* v. *Willoughby*, 345 U.S. 83, 92-94 (1953) (no habeas corpus review of duty assignment); *Feres* v. *United States*, 340 U.S. 135 (1950) (Federal Tort Claims Act inapplicable to service-related torts). "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan*, 484 U.S. at 530 (citing cases).[24]

As the court of appeals itself acknowledged, the 1990 Act calls for exercise of "the discretion of the Commander-in-Chief concerning the domestic deployment of the [N]ation's military resources." Pet. App. 46a. The court further recognized that the task of formulating and applying base closure standards by the Secretary and Commission require military judgment and expertise. *Id.* at 56a-59a; see also *National Federation of Federal Employees* v. *United States*, 905 F.2d 400, 405-406 (D.C. Cir. 1990) (base closure process under 1988 Act). Because the base closure process therefore necessarily involves sensitive judgments of military policy (see, *e.g.*, § 2903(a), (c)(1) and (d)(2)), the court of appeals erred in applying the presumption, developed in different circumstances, that Congress intends judicial review of the outcome of an administrative process.[25]

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[24] If the President certifies that closure of a military base "must be implemented for reasons of national security or a military emergency," he may proceed without regard to the requirements of the Base Closure Act. § 2909(c)(2); see 10 U.S.C. 2687(c). Nonetheless, a package of base closure decisions governed by the Act involves a delicate weighing of considerations of overall military strategy and national defense even when "national security or a military emergency," strictly speaking, does not demand a particular closure.

[25] Although the court of appeals purported to limit judicial review to alleged violations of statutory procedures, the effect of such review would be to overturn the President's exercise of discretion in matters of military policy. The Act permits the President to approve or disapprove the Commission's recommendations for any reason at all. Pet. App. 46a, 69a. The court of appeals' ruling limits the President's ability to exercise that discretion by holding that he must reject recommendations with which he agrees if his

B. The Structure, History, And Purposes Of The 1990 Act Demonstrate That Congress Intended To Preclude Judicial Review Of Respondents' Procedural Claims

Even if the presumption of reviewability were applicable here, this Court has emphasized that "[t]he presumption favoring judicial review of administrative action is just that—a presumption." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984). It is "overcome * * * whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 351. The pertinent congressional intent may be found in various sources. The presumption in favor of judicial review "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." *Id.* at 349. Congressional intent "may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it, or from the collective import of legislative and judicial history behind a particular statute." *Ibid.* (citations omitted). Finally, the presumption of reviewability "may be overcome by inferences of intent drawn from the statutory scheme as a whole." *Ibid.* When measured against these standards, the Act precludes judicial review of the base closure process.

1. Judicial review is incompatible with the structure of the 1990 Act. Like its immediate predecessor—the 1988 Act (see pp. 3-4, *supra*)—the 1990 Act was designed to eliminate unnecessary obstacles to base closures and create a "prompt and rational" process for closing obsolete bases. H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990). To achieve that objective, a process was fashioned that would address the tendency of "political pressures * * * to interfere" with the integrity of the process. H.R. Rep. No. 735, *supra*, Pt. 2, at 8-9; see H.R. Conf. Rep. No. 923, *supra*, at 705; *1991 Report* at 1-1 to 1-2; Pet. App. 77a-79a (Alito, J., dissenting in part).

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subordinates have not observed every procedural particular thought to be required under the 1990 Act.

Accordingly, the 1990 Act is structured to limit the avenues through which political maneuvering can delay or derail the base closure process. By requiring the President to approve the base closure recommendations (§ 2903(e)), Congress provided that the ultimate decision maker in the Executive Branch would be an official directly accountable to the people. At the same time, Congress also called for extensive congressional involvement throughout the process. For example, the Act provides for presidential consultation with key Members of Congress before the President appoints the Commissioners. § 2902(c)(2). The Act also requires the Secretary and the Commission to keep Congress apprised of developments at numerous steps in the preparation of base closure recommendations for the President. See, *e.g.*, § 2903(a)(1), (b)(2), (c)(1) and (d)(3).[26] Finally, the process facilitates substantial congressional oversight by adopting streamlined legislative procedures that eliminate the usual opportunities for delay and strategic maneuvering. §§ 2904(b), 2908.[27]

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[26] The Secretary of Defense must submit the force-structure plan to Congress along with the budget justification documents submitted each year. § 2903(a)(1). In addition, the Secretary was required to transmit to the congressional defense committees the final criteria for base closure selection prepared in 1991. § 2903(b)(2). When the Secretary of Defense publishes his recommended closures in the *Federal Register*, he must also transmit the list of recommendations to those congressional committees. § 2903(c)(1). If the Commission departs from the Secretary's recommendations, it must prepare a report explaining and justifying the departure, and it must transmit that report simultaneously to Congress and the President. § 2903(d)(3).

[27] A Member of Congress may introduce a joint resolution of disapproval within ten days of the President's transmittal of the Commission's report with his approval. § 2908(a). That resolution covers all of the recommendations (*ibid.*), and it is referred to the Armed Services Committee of the appropriate House. § 2908(b). If the Committee does not report on the resolution within 20 days of the President's transmittal, the resolution is automatically dis-

A critical feature of the process is the use of an independent and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, *supra*, at 341. To safeguard the Commission's role, its recommendations must be considered as an indivisible package (H.R. Conf. Rep. No. 923, *supra*, at 704), and the President may trigger base closures under the Act only by approving "all the recommendations" of the independent Commission. See § 2903(e)(2) and (4).[28] The Act's expedited legislative procedures, in turn, apply only to a joint resolution of disapproval applying to all the bases that the President approves for closure, and no amendments to the joint resolution may be entertained. § 2908(a)(2) and (d)(2).

The scheme of the 1990 Act thus reflects a purpose to transform the base closure process into one whose safeguards are provided by the direct, and carefully balanced, participation of the President and Congress. By allowing litigants to contest individual base closures after the President has approved, and Congress has declined to disapprove, an entire package of base closures, the court of appeals has struck at the heart of that mechanism. Under the court's decision, private parties—whose elected representatives failed to achieve their goals through the Act's streamlined legislative procedures[29]—will be able to pick

charged and placed on the legislative calendar. § 2908(c). Three days later, a Member may make a nondebatable motion to proceed to consideration of the resolution. § 2908(d)(1). When the resolution is considered, debate is limited to two hours. § 2908(d)(2).

[28] The President, of course, is free to disapprove the Commission's recommendations in whole or in part. § 2903(e)(3). If he does so, the Commission produces a new set of recommendations. *Ibid.* At that point, if the President does not approve "all of the revised recommendations," no base closures may be effectuated under the Act for that round. § 2903(e)(4) and (5).

[29] As discussed (see pp. 7-8, *supra*), on July 30, 1991, the House of Representatives considered a proposed resolution of disapproval. 137 Cong. Rec. H6006-H6039 (daily ed.). During the debate on

apart the end product of the process. If litigants can sue to extract an individual base (like the Philadelphia Naval Shipyard), from the package of closures and require the Commission to redo its recommendation for that base, "the President and the Congress would then be placed in precisely the situation that the new scheme was designed to avoid—deciding whether to close or spare a single base." Pet. App. 82a (Alito, J., dissenting in part).[30]

2. a. Judicial review also is precluded where it is inconsistent with Congress's goals of expedition and finality. See, *e.g.*, *Morris* v. *Gressette*, 432 U.S. 491, 501-505 (1977). Based on its recognition that "[e]xpedited procedures * * * are essential to make the base closure process work" (H.R. Rep. No. 665, *supra*, at 384), Congress crafted a process that "would considerably enhance the ability of the Department of Defense * * * promptly [to] implement proposals for base closures and realignment." H.R. Conf. Rep. No. 923, *supra*, at 707. Con-

that resolution, several of the respondent Members of Congress argued that the resolution of disapproval should be passed because of alleged flaws in the procedures used to select the Philadelphia Naval Shipyard for closure. See *id.* at H6009-H6010 (Rep. Weldon); *id.* at H6010-H6011 (Rep. Foglietta); *id.* at H6021 (Rep. Andrews). The explicit provision for substantial congressional oversight in the base closure process is strong evidence that Congress did not intend to rely on the courts to police that process. Cf. *Banzhaf* v. *Smith*, 737 F.2d 1167, 1169 (D.C. Cir. 1984) (en banc) ("The lack of any authorization for * * * review at the behest of members of the public, when viewed in the context of [other] limits on judicial review and the explicit provision of congressional oversight as a mechanism to keep the [defendants] to [their] statutory duty, strongly suggests that Congress intended no review at the behest of the public.").

[30] The court of appeals' ruling also fails to appreciate the interrelationship of the determination to close certain bases, and to reassign functions to various other bases, as part of a single package. If a court enjoins the closing of one base, it will undermine the assumptions on which other parts of the package rest. See Pet. App. 81a (Alito, J., dissenting in part).

gress recognized that delay had been one of the significant causes of the stalemate over base closures. See H.R. Conf. Rep. No. 923, *supra*, at 705 (the prior base closures had "take[n] a considerable period of time and involve[d] numerous opportunities for challenges in court"). Accordingly, Congress sought "to prevent delaying tactics by setting short, inflexible time limits for action by the Commission, the President, and the Congress." Pet. App. 75a (Alito, J., dissenting in part).[31]

To that end, Congress established a rigid series of deadlines and time limits to expedite the base closure process. See pp. 5-7, *supra*. For example, the Act provided for the Secretary of Defense to publish his final selection criteria no later than February 15, 1991, and to publish any amendments to those criteria no later than January 15 in 1993 and 1995. § 2903(b)(2)(A) and (B). For the Secretary's submission of recommended base closures, moreover, Congress set deadlines of April 15, 1991, and March 15 in 1993 and 1995. § 2903(c). The Commission is required to transmit its recommendations to the President by July 1 in each of the three years (§ 2903

[31] During the July 30, 1991, debate on the joint resolution of disapproval, one of the principal authors of the 1990 Act emphasized the importance of speed and finality in the legislative scheme:

> [O]ne huge advantage to this base closing procedure is that it allows a base closing decision to be made with some finality. In the past, proposed base closings were often disputed for year[s] before a final verdict was rendered. That was the worst of all possible worlds. Even if the base was eventually saved from closure, the businesses around the base were greatly harmed by the persistent uncertainty.
>
> Under this procedure, however, all the communities affected [have] a chance * * * thoroughly [to] make their case for their base. Now, this time of deliberation will come to an end and the decision will be made. At this point communities can roll up their sleeves, pull together, and find the best way to adjust to the base closure.

137 Cong. Rec. H6008 (daily ed.) (Rep. Armey).

(d)(2)(A)), and the President, in turn, must approve or disapprove the list of recommendations by July 15 (§ 2903(e)(1)). Congress then has 45 days to disapprove the list before it takes legal effect. § 2904(b). That strong emphasis on expedition in the process of selection is hardly compatible with the broad availability of judicial review capable of displacing the results of that process thereafter.

b. The emphasis on expedition and finality is confirmed, moreover, by the fact that Congress expressly exempted the process of selecting bases from the requirements of NEPA. As explained above (see p. 3, *supra*), prior to enactment of the 1988 and 1990 Acts, litigants effectively blocked base closures by mounting procedural challenges under NEPA. See H.R. Conf. Rep. No. 1071, *supra*, at 23. In response, the 1990 Act completely exempts the base selection process from NEPA, and permits NEPA litigation only with respect to a narrow class of post-selection implementation actions. § 2905(c).[32] Congress restricted the availability of NEPA challenges precisely because it "recognize[d] that [NEPA] has been used in some cases to delay and ultimately frustrate base closures." H.R. Conf. Rep. No. 1071, *supra*, at 23. There is no reason to believe that Congress intended to take with one hand what it gave with the other, by barring procedural challenges to the selection decision under NEPA while allowing broad procedural attacks

[32] NEPA applies only to actions by the Department of Defense "(i) during the process of property disposal, and (ii) during the process of relocating functions from a military installation being closed or realigned to another military installation after the receiving installation has been selected but before the functions are relocated." § 2905(c)(2)(A). The Act specifically provides that the Secretary is not required under NEPA to consider "the need for closing or realigning the military installation which has been recommended for closure or realignment by the Commission" or "military installations alternative to those recommended or selected." § 2905(c)(2)(B)(i) and (iii).

on the way the Commission formulates its nonbinding recommendations to the President. The protracted delays inherent in such litigation would directly undermine the objectives that Congress pursued by adopting a streamlined process and eliminating the threat of disruptive litigation.[33]

c. Although the court of appeals acknowledged the 1990 Act's emphasis on expedition and finality, it assumed that those interests lapse once the period for congressional disapproval has expired. Pet. App. 50a-51a. However, even after the base selection process is complete, the 1990 Act places a continuing premium on expedition and finality. Thus, while the 1990 Act permits a limited class of NEPA suits concerning the implementation of individual base closure decisions, the Act subjects such suits to a 60-day time limit. § 2905(c)(3). That strict time limit is inexplicable if speed and finality lose their significance once base closure decisions have become final. Moreover, given the substantial threat to finality and delay from suits like the present one, it is also inexplicable that Congress would have omitted a similar time limitation if it had intended to allow such suits. See Pet. App. 80a-81a n.16 (Alito, J., dissenting in part) ("No statute of limitations was prescribed for a suit of the type at issue here. This seems a clear indication that no such suits were contemplated.").

The court of appeals' narrow view of Congress's concerns with speed and finality also overlooks the cyclical

[33] Contrary to the court of appeals' view (Pet. App. 56a), it is implausible to suppose that Congress's express prohibition of NEPA suits carries the negative implication that other types of procedural claims may be brought under the Act. NEPA cases were the primary litigation-related impediments to base closures. Thus, it was necessary for Congress to deal explicitly with NEPA claims in the 1988 and 1990 Acts. In addition, Congress wished to preserve a narrow class of NEPA claims relating to the implementation of base closures (see § 2905(c)(3)); hence, it was necessary for Congress to draw an explicit line between permissible and prohibited NEPA suits.

nature of the base closure process. The Act provides for three successive biennial rounds of closures (see p. 5, *supra*), and the finality of each round's decisions is vital to planning for the next. Delay caused by litigation over the bases closed during one round would inevitably interfere with successive rounds by creating uncertainty about the existing base structure and capacity of the Armed Services. In short, judicial review, regardless of when it is conducted, cannot be undertaken without jeopardizing the interests in speed and finality emphasized by Congress in the 1990 Act.

4. The legislative history reinforces the strong indicia of unreviewability drawn from the structure and policies of the 1990 Act. As we have already shown, Congress's objective of expedition and finality—which is evident on the face of the Act—is confirmed by legislative history indicating that the 1988 and 1990 Acts were specifically designed to avoid litigation-related delays that had previously shut down the process of base closures. See pp. 2-3, 43-44, *supra*. More directly, the conference report accompanying the 1990 Act "state[s] quite clearly that there would be no APA review of key decisions in the base closing and realignment process." Pet. App. 73a (Alito, J., dissenting in part). Specifically, the 1990 conference report states:

> [N]o final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions therefore, would not be subject to the rulemaking and adjudication requirements and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan * * *, the issuance of selection criteria * * *, the Secretary of Defense's recommendation of closures and realignments * * *, the decision of the President * * *, and the Secretary's actions to carry out the recommendations of the Commission * * *.

H.R. Conf. Rep. No. 923, *supra*, at 706. That passage provides direct confirmation that the 1990 Act was designed with the understanding that the courts would not police official compliance with statutory requirements in the base closure process.[34]

5. Finally, judicial intervention would necessarily give rise to severe remedial problems. Although the court of appeals declined to address in detail the appropriate form of relief, it indicated that it would be proper to remand base closure recommendations to the Secretary and Commission for further proceedings in accordance with the Act. Pet. App. 55a n.13. The Commission itself, however, goes out of existence after each of the biennial base closure sessions; it meets only during 1991, 1993, and 1995, and the terms of its members (other than the Chairman) expire at the end of the Session of Congress in which they were appointed. § 2902(d)(1) and (e)(1). Accordingly, a court cannot remand the base closure decision to the Commission for further proceedings because the Commission cannot act until it has been newly constituted for the next biennial round, and at that point, it is occupied with the next set of base closures.

Moreover, the Act expressly provides that, after expiration of the 45-day period for congressional disapproval

[34] The court of appeals dismissed the 1990 conference report by arguing that its discussion of reviewability was properly understood in terms of its reference to "final agency action." Pet. App. 53a-54a. In the court's view, the report's reference to "[s]pecific actions which would not be subject to judicial review" (H.R. Conf. Rep. No. 923, *supra*, at 706) merely related back to the previous reference to the lack of finality. For two reasons, however, that conclusion does not advance respondents' position. First, it merely reinforces our contention that judicial review is precluded here because respondents are not challenging "final agency action" within the meaning of the APA. Second, the court itself acknowledged (Pet. App. 54a) that some of the "specific actions" described by the report as unreviewable—such as the "decision of the President"—"concededly do not fit" its explanation that the relevant passage was speaking only to the question of final agency action.

of the President's report and certification, the Secretary of Defense "*shall* * * * close all military installations recommended for closure by the Commission in each report transmitted to the Congress by the President pursuant to section 2903(e)." § 2904(a) (emphasis added). A court has no authority at that point to interfere with the Secretary's performance of this mandatory duty by reviewing actions of the Secretary or the Commission that took place before the President submitted the report to Congress. Because any meaningful remedy would therefore jeopardize the Act's policies and undermine its timetable and procedures, it is inconceivable that Congress intended to permit any judicial review of the base closure decisions at all.

C. The Procedural Nature Of Respondents' Remaining Claims Supports The Inference Of Preclusion Of Review

The court of appeals held that although the substance of the base closure decision is unreviewable, Congress did not preclude judicial review of alleged procedural violations of the 1990 Act. Pet. App. 60a-61a, 62a. That distinction does not withstand scrutiny.

First, as explained above (see pp. 2-3, 42, *supra*), the most significant barriers to closing unneeded domestic military installations prior to 1988 consisted of procedural litigation. Congress explicitly made NEPA applicable to base closures in 1977 (10 U.S.C. 2687(b)(2) (Supp. I 1977)), and obligations imposed on federal agencies by NEPA are "essentially procedural." *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980); see also *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Thus, if Congress in 1990 had been concerned only with precluding substantive challenges to base closure decisions, it would not have restricted NEPA actions in Section 2905(c) of the 1990 Act. Second, even though the court of appeals purported to limit its decision to procedural matters, judi-

cial review would inevitably affect the substance of those decisions if, as respondents have requested, the district court enjoins the closure of the Philadelphia Naval Shipyard and other naval installations. Accordingly, it is clear that even procedural claims of the variety that remain at issue here threaten the expedition and integrity of the process established by Congress—which quite explicitly relies on oversight by the President and Congress to see that the law is observed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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